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No. ..800.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

GATE FILM CLUB,

Petitioner,

against

LOUIS M. PESCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

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LOUIS M. PESCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals, Second Circuit entered on the 23rd day of December, 1964. The Court of Appeals affirmed the judgment of the District Court entered June 15, 1964.

Plaintiff by this action seeks a declaratory judgment and an injunction to prevent interference with exhibition of the films in question and similar ones. In the instant case, the motion pictures were free from any question of obscenity. The heart of the issue is the question whether the state may prescribe that a license be applied for and be procured in advance of a public showing of a motion picture, irrespective of the character of the contents of the film.

The issue is therefore of great importance and of publi interest that this court should review the constitutionalit of the New York statute.

Until this court clarifies the *Times Film Corp.* v. *Chicag* 365 U. S. 43, it can only be expected that the lower federa courts will reiterate what was said by the District Cour It is for the purpose of gaining such clarification, thi petition is presented to this Court.

Petitioner in advance of judgment by the Court o Appeals made application to expedite this injunction cas (No. 339 Oct. Term, 1964). This court on October 12, 196 denied the writ with Mr. Justice Douglas for granting The Court of Appeals now having rendered judgment, th petitioner again appeals:

Opinions Below

The District Court wrote an opinion, which is not ye reported, but is printed in Appendix B, hereto. The Cour of Appeals wrote no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered o December 23, 1964. The jurisdiction of this Court is in voked under 28 U.S.C., Section 1254 (1).

Question Presented

Whether the motion picture censorship laws of the Stat of New York, Sections 120-132 of the Education Law ar an unconstitutional prior restraint on the freedom of ex pression in violation of the Constitution of the Unite States, especially as applied to an exhibitor who refuse and still refuses to apply for a license to show motion pic tures to the public.

Statute Involved

The statutory provisions involved are Sections 120-132 of the Education Law of the State of New York. They are printed in Appendix A hereto, page .

Statement

The petitioner partnership, consisting of two residents and citizens of New York, is an exhibitor of motion picture films to the public and charges admission fees for the service.

Since the beginning of January, 1964 and through about the first two weeks in March, 1964 it exhibited films at the Gate Theatre in the City of New York, which was rented by it for that purpose.

It had scheduled the showing of four (4) films there for Monday, March 16, 1964, and had advertised the performance. It was notified by the respondent, who is the director of the Division of Motion Pictures and who is charged by Sections 120 and 122 of the statute with causing the licensing of films—that the films would have to be licensed and would be required to be submitted to him for approval and in the absence thereof, the petitioners would be prosecuted. He also communicated the same information to the owner of the theatre and warned her that she would be prosecuted and her license to operate a theatre would be revoked.

The petitioiner objected to the requirement on the ground that it is a prior restraint and a denial of the freedom of expression, protected by the Constitution of the United States. The petitioner refused and did not apply for a license.

The respondent rejected said claim and repeated his warning to the theatre owner in the afternoon of the

scheduled performance. Thereupon, the owner notified petitioner that the performance would not be permitted, and accordingly, the performance was cancelled.

Petitioner sought other premises for the showing, but the lack of sufficient time prevented the performance that day.

At about 6 o'clock of the night of the scheduled performance, the respondent and a representative of the Department of Licenses of the City of New York appeared at the Gate Theatre and in their presence and because of their presence, the owner of the theatre rejected the formal demand of the petitioner to be permitted to exhibit the films.

Petitioner desires to show the motion pictures in question and similar ones, without applying for a license for such showing. But the interference of the respondent with such exhibition will prevent the performances.

Petitioner moved for a temporary injunction and for the convening of a three-judge court in contemplation of expeditious review by this Court (App. B).

Respondent moved to dismiss the complaint (App. B).

The District Court granted the respondent's motion to dismiss on the authority of *Times Film Corp.* v. *Chicago,* 365 U. S. 43, and denied the petitioner's motion (App. B). Judgment was entered accordingly.

Reasons for Granting the Writ

1. The authority of the *Times Film* case relied by the District Court is misplaced. In the *Times Film* case, the petitioner applied for a license under the statute, but refused to submit the motion picture for examination. The license was refused because of the failure to submit the picture. It then sued *to obtain the permit* without

submission of the film. It was held that it could not get a permit without tendering the film for examination. That case thus does not determine the rights of an exhibitor who does not acknowledge the validity of the licensing statute by totally ignoring it. In *Times Film*, the exhibitor brought himself within the scope of the licensing requirements by applying for, and insisting upon a license. Here, the petitioner seeks to avoid the licensing laws altogether, and contends it cannot be brought under them because such laws are unconstitutional.

It claims its liberty to disseminate ideas without a license is on an equal footing with a street orator or book publisher.

Petitioner also contends that licensing laws cannot be validated as aimed at anticipated possible obscenity. Were this argument sanctioned, then all constitutional protection against prior restraint would be gone. By the same argument it could be urged that all speeches should be submitted to a censor for examination against anticipated incitement to violence or breach of the peace; and all newspapers and periodicals should be submitted to avoid any breaches of security or possible obscenity. Books, the usual medium of obscene publications, should then also be required to be submitted likewise to a licensor. If this rationale were adopted, we will have come full circle back to the licensing powers exercised 300 years ago and against which the First Amendment stands astride.

Unquestioning, licensing is a prior restraint on the expression of the content of the film, for if the respondent should prevent their exhibition without a license, they cannot be shown. If the petitioner attempted to show them it would be subject to the penalties provided for in Section 131 or would be interfered with by respondent by intimidation of theatre owners, who would fear involvement with the law.

Such prior restraint is forbidden by the Constitution. Beginning with *Near* v. *Minnesota*, 283 U. U. 697, the court made clear that prior restraints were forbidden.

In *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, it was held that motion pictures are protected by the First Amendment, and held (p. 503) that motion picture censorship is a prior restraint.

This Court has also announced that the existence of judicial review of the licensor's determinations, does not validate prior restraints by administrative bodies. *Cantwell* v. *Connecticut*, 310 U. S. 296, 306; *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441; *Kunz* v. *New York*, 340 U. S. 290; *Niemotko* v. *Maryland*, 340 U. S. 268, 282.

2. Petitioner also claims that it has been denied the equal protection of the laws. It follows from what has just been argued that the licensing of motion pictures singularly stands out as the only medium of expression that is subject to prior restraint. No rational basis for such selection exists, and therefore the denial of the equal protection of the laws is marked. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Skinner* v. *Oklahoma*, 315 U. S. 535. In *Skinner*, a sterilization law could be invoked against certain types of criminals, but not against others. Embezzlers were not subject to the law, but thieves were. The statute was stricken because no rational basis for the distinction could be made.

There is no difference between motion pictures and other media of expression. Vivid depiction of images by good writings that appeal to the imagination are at least as effective as a film. Television pictures are similar to films yet are not subject to licensing as to content. Whatever difference may be in the media, it is one of form, not of substance.

Since no reasonable basis can be shown to support the distinction made between motion pictures and other media of expression, a violation of the equal protection clause occurs.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: December 24, 1964.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Petitioner,
60 Wall Street,
New York, New York.

APPENDIX A

Statute Involved.

Sec. 120. Motion Picture Division Continued; Organization

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or offices in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

Sec. 121. Local Offices and Bureaus

The regents may authorize the establishment and maintenance of offices and bureaus for the reception and examination of films and for the transaction of the business of the division in such places as efficiency, economy and the public interests require.

Sec. 122. Licenses

The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part

thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of the film not rejected in toto.

Sec. 122-a. Definitions

1. For the purpose of section one hundred twenty-two of this chapter, the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

2. For the purpose of section one hundred twenty-two of this chapter, the term "incite to crime" shall denote a motion picture the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable or respectable behavior; or which advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs. Added L. 1954, c. 620, eff. April 12, 1954.

Sec. 123. Permits

1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

2. Scientific and educational films. Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, wihout examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religous purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

Sec. 124. Review by Regents

An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall be reviewable by a proceeding under article seventy-eight of the civil practice Act at the instance of the applicant.

Appendix A.

Sec. 125. Permits Revocable

Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such director or authorized officer only in the manner provided for license.

Sec. 127. Applications

No license or permit shall be issued for any film unless and until application therefor shall be made in writing in the form, manner and substance prescribed by the education department, and accompanied by the required fee. Such application shall immediately be given a serial number which shall by the producer, owner, or applicant be made a permanent part of the principal title portion of the corresponding film and every copy thereof for which the permit or license is applied, in such style and substance as such department shall prescribe.

Sec. 129. Unlawful Use or Exhibition

It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

Sec. 131. Penalty

A violation of any provision of part two of this article shall be a misdemeanor.

Sec. 132. Enforcement; Rules and Regulations

The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace officer in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations.

APPENDIX B

Opinion Below.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

GATE FILM CLUB,

Plaintiff,

against

LOUIS D. PESCE,

Defendant.

CASHIN, *D. J.*

There are two motions presented to the court for determination in the capitioned action. First, plaintiff seeks an order for a preliminary injunction enjoining defendant from interfering with the public exhibition of unlicensed motion picture films, and for the convening of a statutory court of three judges pursuant to 28 U.S.C. §§ 2281, 2284 to determine this application. Second, defendant moves for an order dismissing the complaint.

Prior to any discussion of the motions, a detailed examination of the allegations of the complaint is necessary. Plaintiff, Gate Film Club, is a New York copartnership consisting of James McBride and Jack Baran, doing business under the name of Gate Film Club. Plaintiff is engaged in the business of exhibiting motion pictures to the public, for which service it charges admission fees. Defendant, Louis M. Pearce, is the Director of the Division of Motion Pictures of the Board of Regents of the University of the State of New York.

According to the allegations of the complaint, from January 1964 until the first two weeks in March 1964, plaintiff

exhibited films to the public at the Gate Theatre, a theatre in New York City rented by plaintiff for that purpose. Plaintiff had scheduled the showing of four films there for Monday, March 16, 1964, and had advertised the performance.

Prior to that date, however, defendant notified plaintiff and the owner of the theatre that the motion pictures were required to be submitted to defendant for license through the Division of Motion Pictures, pursuant to the provisions of the Educational Law of the State of New York (N. Y. Education Law, §§ 120-132). He also told them that if the films were shown without such license plaintiff and the theatre owner would be prosecuted criminally.

The complaint further alleges that plaintiff objected to this requirement on the ground that it was an invasion of plaintiff's constitutional right of freedom of expression under the First Amendment of the United States Constitution. Plaintiff refused to apply for a license. According to the complaint, defendant repeated his threats to the theatre owner and, as a result, the March 16, 1964 exhibition was forbidden by the owner and the performance cancelled. At about 6 o'clock on the night of the scheduled performance, defendant and a representative of the Department of Licenses of the City of New York appeared at the Gate Theatre and were present when the theatre owner rejected the plaintiff's formal demand to be permitted to exhibit the films. Plaintiff sought other premises for the showing, but lack of sufficient time prevented the performance that day.

The complaint further alleges that plaintiff desires to show the motion pictures in question, and similar ones, without submitting them to defendant for licensing.

The essence of the action, therefore, is that plaintiff is seeking to exhibit to the public for admission prices in New York State, a program of motion pictures without obtaining a license from the Department of Education of the State of New York.

Appendix B.

The complaint concludes with a demand for an injunction and a declaratory judgment that the "applicable laws" of New York are unconstitutional, and a demand that a three-judge court be convened to hear the case. Plaintiff has moved for a preliminary injunction, and defendant has moved for dismissal of the complaint.

There is no claim made in the complaint that the administrative procedure for the obtaining of a license does not provide adequate notice or hearing. The effect of the complaint is to make a broadside attack on the constitutionality of a licensing requirement *as such.* On the allegations of unconstitutionality of the "applicable laws" and the absence of an adequate remedy at law, plaintiff asks this court to initiate the extraordinary procedure provided for in 28 U.S.C. §§ 2281, 2284.

The rules for determining whether the three-judge procedure is warranted were laid down in such cases as *Bailey* v. *Patterson,* 369 U. S. 31 (1962); *Phillips* v. *United States,* 312 U. S. 246 (1941); *California Water Service Co.* v. *City of Redding,* 304 U. S. 252 (1938); *Ex Parte Poresky,* 290 U. S. 30, 31-32 (1933). The three-judge requirement is a technical one and is to be construed narrowly. *Phillips* v. *United States, supra,* at 251. "It is . . . the duty of a district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented . . ." *California Water Service Co.* v. *City of Redding, supra,* at 254. That a federal question lacks substance "may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this [Supreme] Court as to foreclose the subject." Id. at 255. See also *Flamm* v. *Hughes,* 329 F. 2d 378 (2 Cir. 1964).

Applying these standards to this case, plaintiff has not shown any circumstances which would necessitate the con-

vening of a three-judge court. The statute which plaintiff attacks is not a new one of constitutionally grave doubt. Rather, it is one which has been appraised and considered over and over again by the United States Supreme Court and the Court of Appeals of New York. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952); *Kingsley International Pictures Corp.* v. *Regents,* 360 U. S. 684 (1958); *Trans-Lux Distributing Corp.* v. *Regents,* 14 N. Y. 2d 88, 248 N.Y.S. 2d 857 (1964).

Indeed, the very issue which plaintiff presents here, i.e., the validity of licensing motion pictures prior to exhibition, was presented and decided in *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43 (1961). There it was decided that although motion pictures are included within the free speech and free press guaranty of the Constitution, there is no absolute freedom to exhibit publicly, at least once, every kind of motion picture. The Supreme Court phrased the issue in its opinion in that case as follows:

> "* * * Admittedly, the challenged section of the ordinance imposes a previous restraint, and the broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone which we decide." Id. at 46.

Later, in its opinion, the Court stated:—

> "* * * Petitioner claims that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or invitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination. The challenge here is to the censor's basic authority; it does not go to any statutory standards employed by the censor or procedural requirements as to the submission of the film." Id. at 47.

The Court continued:

> "Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute, . . . and then only after a transgression. But this position, as we have seen, is founded upon the claim of absolute privilege against prior restraint under the First Amendment—a claim without sanction in our cases." Id. at 49.

See also, *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 (1963).

It is contended by plaintiff that the decision in *Times Film Corp.* v. *City of Chicago, supra,* is inapplicable to the complaint herein, because in *Times* the plaintiff applied for a license under the statute and then refused to submit the motion pictures for examination, where as in the instant case the plaintiff seeks to avoid the licensing laws altogether. It is the opinion of this court that the distinction is inconsequential.

I conclude, therefore, that a substantial federal question is not presented by the complaint herein. Plaintiff's motion for a preliminary injunction and for the convening of a three-judge court is denied, and defendant's motion for dismissal of the complaint is granted. *Bradley* v. *Waterfront Commission,* 130 F. Supp. 303, 305 (SDNY 1955).

It is so ordered.

Dated: New York, N. Y.
June 11th, 1964.

JOHN M. CASHIN,
United States District Judge.

Decision of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 270—September Term, 1964.

(Submitted December 17, 1964

Decided December 23, 1964.)

Docket No. 29065

GATE FILM CLUB,

Appellant,

—v.—

LOUIS M. PESCE,

Respondent.

Before:

FRIENDLY, HAYS and MARSHALL,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Cashin, *Judge,* denying plaintiff's motion for a preliminary injunction against defendant's enforcement of a state law requiring licensing of motion pictures and granting defendant's motion to dismiss the complaint requesting designation of a three-judge court for failure to present a substantial federal question.

Affirmed.

EMANUEL REDFIELD, New York, N. Y., *for Appellant.*

LOUIS J. LEFKOWITZ, Attorney General of the State of New York (Paxton Blair, Solicitor General, Ruth Kessler Toch, Assistant Solicitor General, of counsel), *for Appellee.*

PER CURIAM:

Affirmed on the opinion of Judge Cashin.

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Supreme Court of the United States

No. 800—October Term, 1964

GATE FILM CLUB,

Petitioner,

against

LOUIS M. PESCE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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POINT I. The complaint was properly dismissed because (a) it does not disclose any ground for invoking the three-judge federal statutory procedure for its challenge of the constitutionality of the New York State motion picture licensing statute which has been before this Court numerous times; (b) there is not a substantial federal constitutional question raised because the issue has been recently decided by this Court 6

POINT II. The issue of constitutionality raised by petitioner was decided adversely to its contentions just four years ago by this Court in *Times Film Corp.* v. *City of Chicago* 9

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Supreme Court of the United States

No. 800—October Term, 1964

GATE FILM CLUB,

Petitioner,

against

LOUIS M. PESCE,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Preliminary Statement

Petitioner seeks certiorari to review a judgment of the Court of Appeals, Second Circuit, which had unanimously affirmed the judgment of the District Court, Southern District of New York (JOHN M. CASHIN, D. J.) denying an application for the convening of a Three-Judge Court in an action for declaratory judgment and injunction challenging the constitutionality of the New York State statute which requires the licensing of motion pictures prior to exhibition.

We oppose the granting of certiorari for the reason that the decisions below correctly held that a Three-Judge Court should not be convened because there was not a substantial question involved, since the issue had been definitively decided by this Court in *Times Film Corp.* v. *Chicago,* 365 U. S. 43 (1960).

The New York statute and the opinion of Judge CASHIN are printed as Appendices A and B to this brief.

The Facts

Petitioner's brief contains a detailed statement of facts (pp. 3-4), and therefore we need not go into them in this brief.

Statute Involved

The provisions of the statute, Education Law, Article 3, §§ 120-132, which requires the licensing of motion pictures prior to exhibition, are reproduced in an Appendix to petitioner's brief, pp. 8-12. For convenience, we set forth in Appendix A to this brief those of the provisions of Article 3 which are the core of the statutory requirement.

Licensing procedure under the statute and judicial review of the administrative determination.

Petitioner's attack is on the constitutionality of *a* licensing requirement *as such*. It does not criticize the provisions of the New York statute nor contend that they do not provide adequate constitutional safeguards of notice and hearing. Nevertheless it is of interest to note the administrative procedure under the statute (Education Law § 122).

The practical procedure under the statute all through the years has been that films are submitted to the Motion Picture Division. If the film in whole or in part is deemed to violate the statute, the applicant is notified in writing. The practice is then that the applicant, with Counsel if he elects, and the Motion Picture Division discuss the problem or problems.

If these are not resolved, the applicant has an appeal to the Regents or a Committee of the Regents. At that stage there is opportunity for hearing, with representation by Counsel.

Thus at the administrative level, there are all the safeguards of notice and hearing.

And there is, of course, a review of the determination of the Regents denying license to a film. Education Law § 124; New York Civil Practice Law and Rules, Article 78.

The judicial review afforded has been pursued through the Court of Appeals of New York and to this Court. In virtually all of the cases, not only have the rejection of the film in whole or in part, on the standard in the statute upon which the particular film was denied license been questioned, but the constitutionality of prior licensing as such has been pleaded and argued as an issue, *e.g., Kingsley International Pictures Corporation* v. *The Regents,* 360 U. S. 684 (1958) (Petition ¶ 11[4], [5]); *Trans-Lux Distributing Corp.* v. *Regents,* 14 N. Y. 2d 88 (1964) (Petition ¶ 14; Prayer for Relief #3).

Opinion of District Court, Southern District, Which Was Adopted by the United States Court of Appeals

(Set forth in full, Appendix B to this brief.)

Judge CASHIN held that

> "a substantial federal question is not presented by the complaint herein;"

and that

> "Indeed, the very issue which plaintiff presents here, *i.e.*, the validity of licensing motion pictures prior to exhibition, was presented and decided in *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43 (1961)."

The *Times Film* case, said the Court, had

> "decided that although motion pictures are included within the free speech and free press guaranty of the Constitution, there is no absolute freedom to exhibit publicly, at least once, every kind of motion picture."

The Court quoted the issue from the *Times Film* opinion (365 U. S. at p. 46) and excerpts from this Court's unequivocal position on the constitutionality of prior restraint (365 U. S. at pp. 47, 49). See discussion of *Times Film* case, *infra*, Point II.

Bantam Books v. *Sullivan*, 372 U. S. 58, 70 (1963) was also cited.

The distinction plaintiff seeks to draw between the instant case and the *Times Film* case, in that *Times Film* had applied for a license but refused to submit its motion picture for examination, whereas petitioner here "seeks to avoid the licensing laws altogether", Judge CASHIN held to be "inconsequential". The Court added:

> "The statute which plaintiff attacks is not a new one of constitutionally grave doubt. Rather, it is one which has been appraised and considered over and over again by the United States Supreme Court and the Court of Appeals of New York. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684 (1958); *Trans-Lux Distributing Corp.* v. *Regents*, 14 N. Y. 2d 88, 248 N. Y. S. 2d 857 (1964)."

The Court had noted leading cases on the rules for determining "whether the three-judge procedure is warranted" and that

> "The three-judge requirement is a technical one and is to be construed narrowly",

citing *Phillips* v. *United States*, 312 U. S. 246, 251 (1941), and the necessity for ascertaining that "a substantial

federal question is presented, *California Water Service Co.* v. *City of Redding, supra,* at 254".

The Court early in the opinion had said of the complaint in the instant case:

> "There is no claim made in the complaint that the administrative procedure for the obtaining of a license does not provide adequate notice or hearing. The effect of the complaint is to make a broadside attack on the constitutionality of a licensing requirement *as such*" (Italics by the Court).

ARGUMENT

Respondent will argue:

1—The complaint was properly dismissed because (a) it does not disclose any ground for invoking the three-judge federal statutory procedure; (b) there is not a substantial federal constitutional question raised because the issue has been recently decided by this Court.

2—The issue of constitutionality raised by petitioner was decided adversely to its contention in 1961 by this Court in *Times Film Corp.* v. *City of Chicago.*

POINT I

The complaint was properly dismissed because (a) it does not disclose any ground for invoking the three-judge federal statutory procedure for its challenge of the constitutionality of the New York State Motion Picture Licensing Statute which has been before this court numerous times; (b) there is not a substantial federal constitutional question raised because the issue has been recently decided by this Court.

(1)

Petitioner here alleges unconstitutionality of the State statute it attacks, and absence of an adequate remedy at law. On these conclusory allegations alone it has sought to set in motion the extraordinary federal procedure of 28 U. S. C. §§ 2281-2284 to decide the constitutionality of the State statute.

But the procedure provided in 28 U. S. C. §§ 2281-2284 is not available upon the mere challenging of a State statute as unconstitutional. This extraordinary federal statutory remedy has been provided for cases requiring its special procedure. The exceptional circumstances necessitating it must be demonstrated by one who would pursue that unusual procedure. *California Water Service Co.* v. *City of Redding,* 304 U. S. 252, 254-5 (1938); *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 378 (1948); *Phillips* v. *U. S.,* 312 U. S. 246 (1941); *People of State of Illinois ex rel. Sankstone* v. *Jarecki,* 116 F. Supp. 422, 424, appeal dismissed "for want of a substantial Federal question", 346 U. S. 861 (1953).

These guiding cautionary rules for determining whether the Three-Judge procedure is warranted were laid down in cases which have become classics on the subject. *Phillips*

v. *United States*, 312 U. S. 246, *supra* (1941); *California Water Service Co.* v. *City of Redding*, *supra*, 304 U. S. 252; *Ex Parte Poresky*, 290 U. S. 30, 31-32 (1933); *Ex Parte Collins*, 277 U. S. 565 (1928).

They are guiding principles today. *Bailey* v. *Patterson*, 369 U. S. 31 (1962), *infra*.

Petitioner here has not shown in its complaint any circumstances to suggest the need for the extraordinary procedure provided for special situations (cases, *supra*). Its mere allegations of unconstitutionality and absence of an adequate remedy at law are, of course, not enough.

Petitioner's attack is not on a new statute concerning whose constitutionality there is strong doubt, which should be halted summarily and its constitutionality determined before it is put into operation. Petitioner's attack is on a statute which has been on the books of the State of New York for 43 years (L. 1921, ch. 715; repealed and replaced L. 1927, ch. 154; and subsequently amended), and which has been judicially appraised and considered many times by the Supreme Court of the United States and the highest Court of the State of New York. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587 (1954); *Kingsley International Pictures Corp.* v. *Regents*, *supra*, 360 U. S. 684 (1958); *Trans-Lux Distributing Corp.* v. *Regents*, *supra*, 14 N. Y. 2d 88 (1964).

Accordingly, this is not the kind of case which warrants injunction by the Federal Courts of a State statute, and the burden on the Federal Bench entailed in the summoning of a panel of three Judges (*Phillips* v. *United States*, 312 U. S. at pp. 250, 251, and other cases, *supra*).

Actually, this very statute which is the subject of petitioner's challenge will, if this Court notes probable jur-

isdiction, be before this Court at its current term. An appeal to this Court has been taken (Docket No. 314) from the decision of the Court of Appeals of the State of New York in *Trans-Lux Distributing Corporation* v. *Board of Regents, supra* (14 N. Y. 2d 88), which held certain scenes in a motion picture to be obscene and sustained the withholding of a license for the film, pursuant to the statute here challenged, while the particular scenes were included in it. The constitutionality of the statute itself is attacked in that case (Pet. ¶ 14), as petitioner attacks it in this action, as constituting improper prior restraint.

(2)

Moreover, there is not a substantial federal question presented in this complaint, because the constitutional issue has, so recently that the decision may be termed current, been distinctly decided by this Court in favor of constitutionality. *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43; rehearing denied 365 U. S. 856 (1961). This determinative previous decision of the issue is discussed in Point II, *infra*.

This Court a year later, in a sharp *per curiam* opinion, *Bailey* v. *Patterson*, 369 U. S. 31 (1962), declared:

> "* * * Section 2281 does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking non-existent. *Ex parte Poresky*, 200 U. S. 30; *Bell* v. *Waterfront Comm'n.*, 279 F. 2d 853, 857-858. We hold that three judges are similarly not required when, as here, prior decisions make frivolous any claim that a state statute on its face is not unconstitutional. * * * The reasons for convening an extraordinary court are inapplicable in such cases, for the policy behind the three-judge requirement—that a single judge ought not to be empowered to invalidate a state statute under a federal claim—does not apply."

Similarly "the reasons for convening an extraordinary court are inapplicable" when prior decisions "make frivolous any claim that a state statute on its face is * * * unconstitutional."

POINT II

The issue of constitutionality raised by petitioner was decided adversely to its contentions just four years ago by this Court in *Times Film Corp.* v. *City of Chicago.*

Times Film Corp. v. *City of Chicago*, 365 U. S. 43 (1961), decided that it is not a violation of the Constitution of the United States to require by statute that motion pictures be licensed in advance of exhibition.

Petitioner, as would be expected, casts about for ways to escape the definitive ruling of *Times Film* (Br. pp. 4-5). It seizes the precarious reed of noting that in *Times Film* application had been made for the license but the film was not submitted for inspection. That fact did not enter into this Court's consideration; it was not so much as mentioned in the opinions of the Court, prevailing or dissenting.

The single issue in the *Times Film* case, as stated by petitioner in that case; as stated by respondents in that case; as weighed by this Court, was the selfsame issue that the petitioner here asks that a Three-Judge Court be convened to decide, *i.e.*, the validity of licensing motion pictures prior to exhibition.

That was the single issue in the *Times Film* case, as posed by petitioner, at page 10 of its brief in this Court:

> "The issue here then is whether Chicago has or has not the constitutional right to require the prior sub-

> mission or censorship of Petitioner's motion picture before it can be shown publicly."

That was the single issue in the case, as posed by Respondents, at page 7 of their brief in this Court:

> "Does the City of Chicago have the right to require submission of motion pictures for inspection prior to public exhibition? (Repeated p. 10 of the Brief.)

That was the single issue in the case as phrased in the opinion of this Court (p. 46):

> "* * * Admittedly, the challenged section of the ordinance imposes a previous restraint, and the broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone which we decide. * * *"

The Court (p. 47) summed up petitioner's contention as follows (and with that contention presumably petitioner here would be in accord [*cf.* Br. Point I]):

> "* * * Petitioner claims that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination. The challenge here is to the censor's basic authority; it does not go to any statutory standards employed by the censor or procedural requirements as to the submission of the film".

The opinion reviewed earlier decision which petitioner here cites, on free speech as related to printed publications and motion pictures, and distinguished them.

No case could have been more thoroughly briefed than was *Times Film*, not only by the parties but by *amici curiae*, on every nuance of the First and Fourteenth Amendment guarantees of free speech and equal protection.

After the decision there was an application for rehearing. Once again the parties and six *amici curiae* rebriefed exhaustively the subject of constitutionality of the principle of "prior restraint". This is exactly petitioner's point here.

The petition for rehearing was denied. 365 U. S. 856 (1961).

One of the Justices who dissented in *Times Film* has since then summed up its holding as ruling that prior restraint is not unconstitutional *per se*; and is not unconstitutional in the case of motion pictures. Said Mr. Justice BRENNAN in *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 71 (1963):

> "The * * * question tendered to the Court in that [*Times Film*] case was whether a prior restraint was necessarily unconstitutional *under all circumstances.* In declining to hold prior restraints unconstitutional *per se,* the Court did not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confined to motion pictures." (Italics by the Court.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: January 29, 1965.

Respectfully submitted,

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APPENDICES

Appendix A

STATUTE INVOLVED

(Certain pertinent provisions of Education Law, Article 3)

"§ 122. *Licenses*

The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected *in toto.*"

"§ 124. *Review by regents*

An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall be reviewable by a proceeding under article seventy-eight of the civil practice act at the instance of the applicant."

"§ 129. *Unlawful use or exhibition*

It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay

or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe. * * *"

"§ 131. *Penalty*

A violation of any provision of part two of this article shall be a misdemeanor."

Section 123, excluded from the coverage of § 129, provides:

"§ 123. *Permits*

1. 'Current event' film. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

2. Scientific and educational films. Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes, or by any employer for the instruction or wel-

fare of his employees, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

Appendix B

OPINION OF
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

GATE FILM CLUB,

Plaintiff,

against

LOUIS M. PESCE,

Defendant.

64 Civ. 981.

CASHIN, D. J.

There are two motions presented to the court for determination in the captioned action. First, plaintiff seeks an order for a preliminary injunction enjoining defendant from interfering with the public exhibition of unlicensed motion picture films, and for the convening of a statutory court of three judges pursuant to 28 U. S. C. §§ 2281, 2284 to determine this application. Second, defendant moves for an order dismissing the complaint.

Appendix B

Prior to any discussion of the motions, a detailed examination of the allegations of the complaint is necessary. Plaintiff, Gate Film Club, is a New York copartnership consisting of James McBride and Jack Baran, doing business under the name of Gate Film Club. Plaintiff is engaged in the business of exhibiting motion pictures to the public, for which service it charges admission fees. Defendant, Louis M. Pesce, is the Director of the Division of Motion Pictures of the Board of Regents of the University of the State of New York.

According to the allegations of the complaint, from January 1964 until the first two weeks in March 1964, plaintiff exhibited films to the public at the Gate Theatre, a theatre in New York City rented by plaintiff for that purpose. Plaintiff had scheduled the showing of four films there for Monday, March 16, 1964, and had advertised the performance.

Prior to that date, however, defendant notified plaintiff and the owner of the theatre that the motion pictures were required to be submitted to defendant for license through the Division of Motion Pictures, pursuant to the provisions of the Education Law of the State of New York. (N. Y. Education Law, §§ 120-132). He also told them that if the films were shown without such license plaintiff and the theatre owner would be prosecuted criminally.

The complaint further alleges that plaintiff objected to this requirement on the ground that it was an invasion of plaintiff's constitutional right of freedom of expression under the First Amendment of the United States Constitution. Plaintiff refused to apply for a license. According to the complaint, defendant repeated his threats to the

theatre owner, and as a result, the March 16, 1964 exhibition was forbidden by the owner and the performance cancelled. At about 6 o'clock on the night of the scheduled performance, defendant and a representative of the Department of Licenses of the City of New York appeared at the Gate Theatre and were present when the theatre owner rejected the plaintiff's formal demand to be permitted to exhibit the films. Plaintiff sought other premises for the showing, but lack of sufficient time prevented the performance that day.

The complaint further alleges that plaintiff desires to show the moton pictures in question, and similar ones, without submitting them to defendant for licensing.

The essence of the action, therefore, is that plaintiff is seeking to exhibit to the public for admission prices in New York State, a program of motion pictures without obtaining a license from the Department of Education of the State of New York.

The complaint concludes with a demand for an injunction and a declaratory judgment that the "applicable laws" of New York are unconstitutional, and a demand that a three-judge court be convened to hear the case. Plaintiff has moved for a preliminary injunction, and defendant has moved for dismissal of the complaint.

There is no claim made in the complaint that the administrative procedure for the obtaining of a license does not provide adequate notice or hearing. The effect of the complaint is to make a broadside attack on the constitutionality of a licensing requirement *as such*. On the allegations of unconstitutionality of the "applicable laws" and the absence of an adequate remedy at law, plaintiff asks

this court to initiate the extraordinary procedure provided for in 28 U. S. C. §§ 2281, 2284.

The rules for determining whether the three-judge procedure is warranted were laid down in such cases as *Bailey* v. *Patterson*, 369 U. S. 31 (1962); *Phillips* v. *United States*, 312 U. S. 246 (1941); *California Water Service Co.* v. *City of Redding*, 304 U. S. 252 (1938); *Ex parte Poresky*, 290 U. S. 30, 31-32 (1933). The three-judge requirement is a technical one and is to be construed narrowly. *Phillips* v. *United States*, *supra*, at 251. "It is * * * the duty of a district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented * * *" *California Water Service Co.* v. *City of Redding*, *supra*, at 254. That a federal question lacks substance "may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this [Supreme] court as to foreclose the subject." *Id.* at 255. See also *Flamm* v. *Hughes*, 329 F. 2d 378 (2 Cir. 1964).

Applying these standards to his case, plaintiff has not shown any circumstances which would necessitate the convening of a three-judge court. The statute which plaintiff attacks is not a new one of constitutionally grave doubt. Rather, it is one which has been appraised and considered over and over again by the United States Supreme Court and the Court of Appeals of New York. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684 (1958); *Trans-Lux Distributing Corp.* v. *Regents*, 14 N. Y. 2d 88, 248 N. Y. S. 2d 857 (1964).

Appendix B

Indeed, the very issue which plaintiff presents here, *i.e.*, the validity of licensing motion pictures prior to exhibition, was presented and decided in *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43 (1961). There it was decided that although motion pictures are included within the free speech and free press guaranty of the Constitution, there is no absolute freedom to exhibit publicly, at least once, every kind of motion picture. The Supreme Court phrased the issue in its opinion in that case as follows:

> "* * * Admittedly, the challenged section of the ordinance imposes a previous restraint, and the broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone which we decide." *Id.* at 46.

Later, in its opinion, the Court stated:

> "* * * Peitioner claims that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination. The challenge here is to the censor's basic authority; it does not go to any statutory standards employed by the censor or procedural requirements as to the submission of the film." *Id.* at 47.

The Court continued:

> "Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute, * * * and then only after a transgression. But this position, as we have seen, is founded upon the claim of absolute privilege against prior

> restraint under the First Amendment—a claim without sanction in our cases." *Id.* at 49.

See also, *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963).

It is contended by plaintiff that the decision in *Times Film Corp.* v. *City of Chicago, supra*, is inapplicable to the complaint herein, because in *Times* the plaintiff applied for a license under the statute and then refused to submit the motion picture for examination, whereas in the instant case the plaintiff seeks to avoid the licensing laws altogether. It is the opinion of this Court that the distinction is inconsequential.

I conclude, therefore, that a substantial federal question is not presented by the complaint herein. Plaintiff's motion for a preliminary injunction and for the convening of a three-judge court is denied, and defendant's motion for dismissal of the complaint is granted. *Bradley* v. *Waterfront Commission*, 130 F. Supp. 303, 305 (S. D. N. Y. 1955).

It is so ordered.

Dated: New York, N. Y., June 11th, 1964.

/s/ JOHN M. CASHIN,
United States District Judge.